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DUE PROCESS OF LAW.

Persistent and Harmful Influence of *Murray v. Hoboken Land & Improvement Co.*

The principle embodied in what is known as due process of law is the outcome of the progressive histories of the English and American peoples, considered as one unbroken development. It has no prototype in the constitutional history of any other people. As Lieber has expressed it: "The guarantee of the supremacy of the law (due process) leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been in our system of liberty the natural production of a thorough government of law as contradistinguished from a government of functionaries."¹

As thus defined, due process of law stands as the anti-pole of what French jurists call *droit administratif*, which rests upon the assumption that the government and each of its servants possesses a body of special rights and privileges as against private citizens to be fixed on principles different from those defining the legal rights and duties of one citizen toward another. Under that theory, speaking generally, the ordinary tribunals have no concern with the administrative law (*droit administratif*) as applied by administrative courts (*tribunaux administratifs*), at the head of which stands the Council of State. For example, if a body of policemen in France who have broken into a monastery, seized its property and expelled its inmates under an administrative order, are charged with what English lawyers would call trespass

¹ Civil Liberty and Self-Government, 91.

and assault, they would plead as an exemption the government's mandate in the execution of its decrees dissolving certain religious societies. If the right to plead that exemption is questioned before an ordinary civil tribunal, a "conflict" arises which cannot be settled by an ordinary judge under what we call the law of the land. In that illustration we have a sharply defined distinction between "A thorough government of law as contradistinguished from a government of functionaries."

The English idea of due process was first embodied in chapter 39 of Magna Carta which provides that "No freeman shall be arrested or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested: and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the lands." After being reproduced in all the original state constitutions chapter 39 passed into the Federal Constitution² in this form: "No person shall be * * * deprived of life, liberty, or property, without due process of law." Not until 1856 was that vital provision construed in the famous case of *Murray v. Hoboken Land & Improvement Company*. In that case, the court, speaking through Mr. Justice Curtis, undertook to define, for the first time, the term "due process of law" as contained in the Fifth Amendment, and to adjudge that such due process had not been denied Samuel Swartwout in a case in which his land had been sold under a warrant issued by the solicitor of the Treasury under an act of Congress of May 15, 1820, authorizing the issuance of such a warrant. The account of Swartwout, as collector of the customs for the Port of New York, "was audited by the first auditor, and certified by the comptroller of the Treasury; and for the balance thus found, amounting to the sum of \$1,374,119.65, the warrant in question was issued by the solicitor of the Treasury." It was admitted by the court that all the proceedings fixing that vast sum as a lien on the land of Swartwout were purely *ex parte*; that he had no notice from or hearing before the purely ministerial officers by whom that so-called judgment for more than a million and a quarter of dollars was rendered against him. It was careful to declare in express terms that the Treasury officials who thus rendered judgment against Swartwout were purely ministerial officers armed with no judicial power whatever. "It must

² Fifth Amendment.

³ 18 How. 272.

be admitted," said the court, "that, if the auditing of this account and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings." The sole question at issue was this: Did a warrant or execution so issued, in conformity with the terms of an act of Congress directing its issue, after ministerial officers, armed with no judicial authority whatever, had, in a purely *ex parte* proceeding, without notice or hearing of any kind, entered up a judgment as a lien on Swartwout's land, constitute "due process of law" as defined by the Fifth Amendment? It is impossible for an American lawyer to understand how such an *ex parte* proceeding, without notice or hearing, could have constituted due process of law, if he is unable to accept the startling contention set up by the court in a vain effort to defend it.

That contention was this: (1) that by virtue of certain statutes⁴ passed in the most despotic days of the Tudor monarchy, a special rule or practice had grown up in the Court of Exchequer that authorized the collection of debts due to the crown from receivers of the revenue by a summary process which only required that auditors should, in an *ex parte* proceeding, without any notice whatever to the alleged debtor, ascertain the amount supposed to be due, for the collection of which an execution against the debtor could be forthwith delivered by the Pipe Office to the sheriffs; (2) that such rule or practice had been established in England as an exception to the general rule known as the law of the land or due process ordained by Magna Carta, by reason of a certain supposed necessity which the court described in these terms: "It may be added, that probably there are few governments which do or can permit their claims for public taxes, *either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy according to the course of the law of the land.* Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties; but always

⁴ 33 Hen. VIII., c. 39; 13 Eliz., c. 4.

in some way observed and yielded to;" (3) that such special rule or practice, supposed to have been built up in the Tudor time in defiance of and as an exception to the general rule embodied in the law of the land or due process as ordained by Magna Carta, was brought over by our ancestors and so firmly established in our colonial system that it lived on in defiance of the Petition of Right and the Bill of Rights, until it was finally embedded, *by implication*, in the Fifth Amendment.

Mr. Justice Curtis frankly admits that the special rule or practice in question, as a means of collecting debts due to the Crown, was one of the abuses that had existed prior to the granting of Magna Carta, Chapter 9 of which was specially designed for its removal. He says, "It is difficult, at this day, to trace with precision all the proceedings had for these purposes (summary methods for the collection of debts due to the Crown) in the earliest ages of the common law. That they were summary and severe and had been used for purposes of oppression, is inferable from the fact that one chapter (9) of Magna Carta treats of their restraint." That vitally important part of the matter should be made more clear by the aid of historical knowledge not available in 1856. Due process as now understood throughout the English-speaking world had its origin in Chapter 39 of the Great Charter of Liberties of 1215, which provided that "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; *and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.*" What was the meaning, at the time they were used, of those italicized words? In explaining them the greatest commentator on Magna Carta has said: "Its main object (Chap. 39) was to prohibit John from resorting to what is sometimes whimsically known in Scotland as 'Jeddart justice.' It forbade him for the future to place execution before judgment. Three aspects of this prohibition may be emphasized. (1) *Judgment must precede execution.* In some isolated cases, happily not numerous, John proceeded, or threatened to proceed, by force of arms against recalcitrants as though assured of their guilt, without waiting for legal procedure." And then, after stating that "Complaint was made of arrests and imprisonments suffered 'without judgment,'" the same authority adds: "Mr. Bigelow considers that such cases were numerous. See *Procedure*, 155: 'The practice of granting writs of execution without trial in the courts appears to have

been common.'"⁵ Thus we know for certain what was the real moving cause that prompted the baronage to demand that the Crown should bind itself, by the terms used in Chapter 39 of Magna Carta, not to render judgment first, without a hearing or legal procedure of any kind, as in the case of Swartwout; and then to send out a writ of execution, without a trial in the courts. The phrase "we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land," which has such a strange and incoherent sound in modern ears, was perfectly understood early in the thirteenth century when John was in the habit of setting forth against a man, or sending an armed retinue against him to collect some debt due to the Crown upon which no proceeding had been had in any court. Again, to quote Professor McKechnie⁶: "The idea of open violence, thus clearly indicated, is expressed in contemporary documents by the fuller phrase, *per vim et arma*."

Is it natural, is it reasonable to suppose that the debtors of the Crown, most numerous among the baronage who led the fight for Magna Carta primarily for their own benefit, deliberately excluded themselves from the protection against execution before judgment given by Chapter 39? It is impossible for such an assumption to arise because it is answered in advance by Chapter 9, specially designed to prevent any doubt on that subject: "Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distrained, so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties." In explaining the history and meaning of that chapter, Professor McKechnie says⁷: "The Charter now passes to another group of grievances. Chapters 9 to 11 treat of the kindred topics of debts, usury and the Jews, and should be read in connection with each other, and with

⁵ McKechnie, Magna Carta, 437-38.

⁶ P. 436, note 2.

⁷ P. 262.

Chapter 26, which regulates the procedure for attaching the personal estate of deceased Crown tenants who were also Crown debtors. The present chapter, although quite general in its terms, *had special reference to cases where the Crown was the creditor*; while the two following chapters treated more particularly of debts contracted to Jews or other money lenders. The fact that John's subjects owed debts to his exchequer did not, of course, imply that they had borrowed money from the King. The sums entered as due in the Rolls of the Exchequer represented obligations which had been incurred in many different ways. What with feudal incidents and scutages and indiscriminate fines, so heavy in amount that they could only be paid by installments, a large proportion of Englishmen must have been permanently indebted to the Crown. At John's accession most of the northern barons still owed the scutages demanded by Richard. John remitted none of the arrears, while imposing new burdens of his own. *The attempts made to collect these debts intensified the friction between John and his barons.* It was, further, the Crown's practice wherever possible to make its debtors find sureties for their debts, thus widening the circle of those liable to distraint, while the officers who enforced payment were guilty of irregularities, which became the cloaks of grave abuses." The legal historians have thus fixed the fact that the great motive cause that prompted the baronage to demand the insertion in the Great Charter of Chapter 39, guaranteeing due process of law, or the law of the land, was John's oppressive practice of collecting debts due to the Crown from its debtors by force of arms, "*per vim et arma*," thus carrying into effect "*writs of execution without trial in the courts*"—words that exactly describe the writ issued and executed by ministerial officers of the United States in the case of Swartwout. In order to render impossible the issuance of such writs for all time were inserted in Magna Carta, first, Chapter 39, as a general prohibition, and second, Chapter 9, as a special prohibition against the collection of Crown debts by execution prior to judgment. "The attempts made to collect these debts intensified the friction between John and his barons."

After admitting that the special rule or practice in question, *the sole and only basis of the judgment in Murray v. Hoboken Land & Improvement Company*, had been stigmatized by Chapters 9 and 39 of Magna Carta as contrary to due process of law,

Mr. Justice Curtis undertook the dreary task of demonstrating by the aid of a few authorities, really hostile to his contention, that such special rule or practice prevailed in the Court of Exchequer by virtue of two statutes, 33 Hen. VIII., c. 39, and 13 Eliz., c. 4. The leading authority he cites is Coke, whose "Second Institute," a commentary on Magna Carta, was published in 1632. Its author, who as Privy Councillor sat in the Star Chamber, died September 3, 1634, while the entire code of Star Chamber law and High Commission law was in full force. It is not therefore strange that Mr. McKechnie⁸ should say what everybody now knows, that "Coke, following the vicious method of assuming the existence, in some part of Magna Carta, of a warrant for every legal principle in his own day, has utterly mislead several generations of commentators." And yet even with Coke's aid the learned justice was unable to prove that the special rule or practice upon which he relied ever cut off, even in the darkest days of the Tudor despotism, the right of a Crown debtor to have the amount of his debt ascertained by the verdict of a jury in a court of justice prior to the issue of an execution for its collection. The nemesis of his argument is to be found in the phrase "*writ of extent*," to which he constantly refers and whose real nature he entirely misunderstood. He says: "To authorize a *writ of extent*, however, the debt must be matter of record in the King's exchequer. The 33 Henry VIII., ch. 39, sec. 50, made all specialty debts due to the King of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record. In regard to debts due upon simple contract, other than those due from collectors of the revenue and other accountants of the Crown, the practice, from very ancient times, has been to issue a commission to inquire as to the existence of the debt. This commission being returned, the debt found were thereby evidenced by a record, and an *extent* could issue thereon. No notice was required to be given to the alleged debtor of the execution of this commission (2 Tidd's Practice, 1047) though it seems that, in some cases, an order for notice might be obtained (1 Ves. 269). Formerly, no witnesses were examined by the commission (Chitty's Prerogative, 267; West, 22), the affidavit prepared to obtain an order for an *immediate extent* being the only evidence introduced. But this practice has been recently changed (11 Price, 29). Let us pause here and

⁸ P. 447.

examine the authority last cited,⁹ a case explaining the nature of a "*writ of extent*," and the circumstances under which it might be issued. From the head note we learn that the inquisition upon which the Fiat was obtained and the Extent sued out, was made *without viva voce testimony having been given to the jury of the existence of the debt*, and that they found the debt to be due, solely on the usual affidavit on which the Judge's Fiat is obtained, made for that purpose, by or on the part of the prosecutors of the *Extent*." In his opinion, delivered in this issue, Baron Wood said:¹⁰ "There are two things necessary to be done before an *extent* can be properly issued, without which it can not be supported. First, an affidavit must be made to produce before the Judge, and then, *an inquisition must be taken before a jury*. Now, all inquisitions so taken before a jury can only by course of law be taken on *viva voce testimony produced before them*."

In the later case of *Regina v. Ryle*,¹¹ in which the Crown had sued out an *immediate extent*, in order to collect 2,492*l.* 7*s.* 7*d.* from a defaulting Crown officer, we have a complete and luminous exposition of the entire subject. In that case the Court reviewed *Rex v. Hornblower* and modified the requirement as to *viva voce* testimony before the jury in the inquisition taken prior to the issuance of the writ of extent. It held that an affidavit was sufficient, because, as the Solicitor General contended: "The debt is not conclusively found by the inquiry before the jury but the party (the Crown debtor) is at liberty to *traverse the debt in the proceedings which subsequently take place*." In confirming that contention, the court said: "That there can be no debt of the Crown upon which process can issue, *except it be a debt on record*. Upon what is that founded? Upon nothing but usage. One does not see any principle why the Crown should not be able to proceed for the recovery of a debt in the same way as a subject, but a usage has grown up which we do not disturb, that the debts of the Crown must be found by record, must be on the records of the court, before the process can issue to enforce them. Formerly that process called upon the party to appear, and to contest his debt in the suit. The statute of the 33 Henry VIII was passed for the purpose of giving the Crown a more rapid procedure, and *for the very purpose of securing the debt before the party should have time to abscond or make way with*

⁹ *Rex v. Hornblower*, vol. 11, p. 29, Price's "Reports of Cases Argued and Determined in the Court of Exchequer."

¹⁰ P. 39.

¹¹ 9 M. & W. 227.

his goods. The process by *scire facias* would give him that opportunity. The legislature, therefore, in the time of Henry VIII, passed this act for the purpose of authorizing the Court of Exchequer, or any other court in which the King's debt is entered on record, to issue an immediate process for execution, a *capias*, *extendi*, *facias*, or a subpcena. But that statute has provided a remedy for all possible inconvenience that might result; for it enacts, by the 79th section, 'that if any person or persons of whom any such debt or duty is or at any time hereafter shall be demanded or required, allege, plead or declare, or show, in any of the said courts, good, perfect and sufficient cause and matter in law, reason, or good conscience, in bar of the said debt or duty, etc., the said courts, and every one of them, shall have full power and authority to accept, adjudge, and allow the same proof, and wholly and clearly to acquit and discharge all and every person and persons that shall be so impleaded, sued, vexed, or troubled for the same.' That clause allows the party to plead to the extent, or to apply by summary motion, which is often done, to the court, for the purpose of showing good grounds to discharge him from that process, and the court often acted upon it, and hence, as well in law as in equity and good conscience, the court has an equitable jurisdiction, in all cases of process of this sort, to *enter upon the whole merits of the case*, and to discharge the party, if, in equity and good conscience, he ought to be discharged." After holding that an affidavit was sufficient proof before the jury in the preliminary inquisition, the court concluded by saying: "I think it was such evidence as the jury might take and find the debt upon. The party is not prejudiced by not being summoned to attend before them, because the appeal is open to him afterwards when the process is issued, and the very object of the statute of Henry VIII, was to enable the court to issue a more immediate process, *leaving it open to the party to plead before execution as he might have done previously*." Here we have the whole matter in a nut shell. (1) The Crown was so hampered by an old usage that it could not proceed at all against a Crown debtor until its debt was "on the records of the Court." For that reason, it was necessary to call in the auditors of the exchequer when a collector of the revenue made default, so that their finding (*ex parte* because it did not bind the debtor) might put the claim of the Crown "on the records of the court," to the end that an *extent in chief* might be applied for. (2) Before such a writ could issue a jury had

to be called and proof taken, at one time *viva voce*, at another by affidavit, convincing the first jury of the existence of the debt. (3) Not until that proceeding had been completed could the writ of extent issue under the statute of Henry VIII, which carefully provided that after the Crown debtor's lands and goods had been seized, "for the very purpose of securing the debt," such debtor could come into court, dispute the debt by any defence that he might see fit to set up, thus giving to the court jurisdiction "to enter upon the whole merits of the case." What fixes the fact that the writ of extent was, as we would say here, simply *an attachment to secure a debt*, and not an execution, is the authority which declares that the sheriff is not entitled to sell the goods and chattels he has seized under the extent without the issue of a writ of *venditioni exponas*.¹² Thus it appears that *two jury trials were necessarily provided in every proceeding against Crown debtors by writ of extent*. The first ascertained whether there was probable cause justifying its issuance, including of course a preliminary examination as to the amount of the debt. The second gave the Crown debtor his day in court, coupled with the right to make every defence, and "to enter upon the whole merits of the case," before there could be a sale of the goods under a *venditioni exponas*, which could not be issued until the second and real trial was over. (4) But in the event that third persons came in and claimed that the goods seized as the Crown debtor's were really their own, then a third jury trial was ordered for their benefit.¹³ In the last case cited, illustrating the Crown's priority in a colony, it was "held, that the rights of the Crown to be paid, in preference to other creditors, out of the estate of a defaulting treasurer (at Trinidad), was confined to his default in respect of moneys in his hands as treasurer, and as a part of the revenue of the colony."

Here the fact should be emphasized that the writ of extent is not one of the prerogative writs, and that the right to its issuance did not accrue to the King by virtue of the common law, but solely by sections 50 and 53 of the statute 33 Henry VIII., c. 39. So says West, the great authority on the subject.¹⁴ The writ is in full force in England to-day, and a complete account

¹² *Rex v. Hopper*, (1816) 3 Price 40; 18 R. R. 641.

¹³ See *Rex v. Collingridge*, 3 Price 280; *Rex v. Randell*, 5 Price 376; *Rex v. Lambton*, 5 Price 421; *Wildes v. Atty. Gen. for Trinidad*, 3 Moore, P. C. 200.

¹⁴ *Treatise of the Law and Practice of Extents*, Chap. 1.

of it may be found in the Earl of Halsbury's great work, "The Laws of England."¹⁵ It is there thus defined¹⁶: "The writ of extent is the process by which the Crown can seize the body, lands, goods, and debts or other choses in action of its debtor by summary process for the purpose of obtaining satisfaction of debts due it." The old proceeding, as heretofore described, has not been changed in any material particular; trial by jury is still guaranteed at every stage of it. And now, as always, careful provision is made by the laws of England for court procedure and trial by jury in all cases in which the Crown is compelled to enforce the collection of its revenue. From the same authority we learn¹⁷ that "Proceedings for the recovery of penalties under the Customs Acts in the High Court of Justice may be commenced either by writ of *subpœna*, or by writ of *capias*. . . . The writ of *capias* is issued by direction of the Attorney General and on the fiat of a judge. . . . The suit is set down for hearing by the Crown. Notice of trial, which must be given by the Crown, is ten days in all cases, and countermand of notice of trial must be given four days before the time mentioned in the notice of trial, unless short notice of trial has been given, when two days are sufficient. The trial is usually *before a judge and special jury*, and the associate in all cases at *nisi prius* is to take the verdict." It thus appears that Mr. Justice Curtis was in the gravest possible error, *so far as the law of England is concerned*, when he said "that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land." Upon the contrary in England, ever since Chapters 9 and 39 of the Magna Carta went into effect, most careful provision has been made for court procedure, including trial by jury "according to the course of the law of the land," whenever the Crown asserts "claims for public taxes, either on the citizen or the officer employed for their collection or disbursement." Mr. Dicey, in expounding the doctrine of due process as it is understood in the English constitutional system, has said¹⁸: "In England the idea of legal equality, or of the

¹⁵ Vol. X, under the title, "Proceedings on the Revenue Side of the King's Bench Division."

¹⁶ P. 14.

¹⁷ P. 8.

¹⁸ The Law of the Constitution, 183.

universal subjection of all classes, to the law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or *collector of taxes*, is under the same responsibility for every act done without legal justification as any other citizen." The idea that a special class of persons, for example Crown debtors, could be exempt from the protection of a system whose main feature is its universal application to all classes, is an unthinkable solecism which no English judge could possibly embody in a judgment or decree. That solecism becomes still more pronounced when we remember that the protection of Crown debtors against executions before judgment was the leading motive that compelled the insertion of Chapter 39 of the Great Charter upon which due process is founded. In attempting to prove the existence of the special Exchequer rule or practice upon which alone he based the judgment of the court in the case in question, Mr. Justice Curtis not only ignored the general principle of due process in England, so luminously stated by Mr. Dicey, but, stranger still, he fell into hopeless confusion by mistaking a writ of extent for a writ of execution. It is undoubtedly true, as he says, that there was a time when, in the event of defaults by collectors of the revenue, the balances against them were made up by auditors of the Exchequer. To use his own words, "these balances were found by auditors, the particular officers acting thereon have been, from time to time, varied by legislation and usage." What was the effect of their findings? He gives us the answer. "By the statute 13 Eliz., ch. 4, balances due from receivers of the revenue and all other accountants of the Crown were placed on the same footing as debts acknowledged to be due by statute staple." That is to say a debt due upon open account was by the action of the auditors converted into a debt of record, upon which the writ of extent could be sued out. It could not be sued out at all until the debt was first made a matter of record. In the words of the learned Justice: "To authorize a writ of extent, however, the debt must be a matter of record in the King's exchequer. The 33 Henry VIII., ch. 39, sec. 50, made all specialty debts due to the King of the same force and effect as debts by statute staple, thus giving to such debts the effect of debts of record." The fact is thus fixed that after the auditors of the Exchequer had converted the balance due on open account from a collector into a debt of record, a writ of extent could be issued for its collection; and a writ of extent was simply what

American lawyers call an attachment, because its sole purpose was to give the Crown a preference lien upon the lands and goods of the debtor as against bona fide purchasers. Blackstone makes it all very plain when, in describing the writ of extent, he says¹⁹: "The lands and goods may be taken by the process, usually called an extent, or *extendi facias*, because the sheriff is to cause the lands, etc., to be appraised to their full *extended value*, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be paid; . . . so that, if such officer of the Crown aliens for a value consideration, the land shall be liable to the sovereign's debt even in the hands of a bona fide purchaser, though the debt to the Crown was contracted by the vendor many years after the alienation." Thus we know for certain that the writ of extent that went into the hands of the sheriffs, at the suit of the Crown, to collect its debt of record was not an execution, as Mr. Justice Curtis erroneously supposed, *ending a litigation, but an attachment beginning one*. Before the writ could be issued the Crown had first to satisfy the jury on the first inquisition that the circumstances justified its issue. Then followed the trial on the merits upon every defence the Crown debtor saw fit to impose, as explained heretofore by the opinions of the Exchequer judges in *Rex. v. Hornblower*, and in *Regina v. Ryle*.

No trained lawyer who will read the perfectly clear history of the processes provided by English law for the collection of debts due to the Crown since the violent methods of John, based on the "grantings of writs of execution without trial in the courts," were abolished by Chapters 9 and 39 of the Great Charter, can doubt for a moment *that the single ground upon which the judgment in Murray v. Hoboken Land & Improvement Company was based is absolutely foundationless*. The entire history, illuminated as it is by the Exchequer reports, West's Treatise, and the recent restatement of the whole matter by the Earl of Halsbury in "The Laws of England," annihilates the assumption that, even in the darkest days of the Tudor despotism, auditors of the Exchequer, without notice or hearing, could enter up a balance against a collector of the revenue as a final judgment upon which execution could issue. As no such rule or practice ever existed in England at any time, the Act of Congress of May 15, 1820, authorizing ministerial officers of the Treasury of the

¹⁹ 3 Bl. Com. 424-5.

United States, armed with no judicial powers whatever, to do such a thing here was of course grossly unconstitutional because forbidden by the due process clause of the Fifth Amendment which denies, when properly interpreted, that claims against collectors of the revenue can ever cease to be "subjects of judicial controversy according to the course of the law of the land."

It is equally impossible to defend the judgment of the court in the case in question, even if we admit for the sake of the argument, the existence in England of the special rule or practice which is its sole and only basis, for the simple and conclusive reason that the entire fabric of despotic law, generally known as Star Chamber law built up during the Tudor period, was swept away by the Revolutions of 1640 and 1688. The English constitutional law that passed into our first state constitutions, and thence into the first eight amendments to the Federal Constitution, was drawn from the reformed English system as Blackstone defined it in 1758, and not from the unreformed system as Coke described it in 1632, with the Star Chamber and High Commission intact. That vital historical fact was first accepted by the Supreme Court of the United States in *Hurtado v. California*²⁰ when, in openly repudiating the definition of due process contained in *Murray v. Hoboken Land & Improvement Company*, it said: "It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray v. Hoboken Land & Improvement Company*, 18 How. 272. . . . The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. This would be all the more singular and surprising in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions, the words of Magna Carta stood for very different things at the time of

²⁰ 110 U. S. 528.

the separation of the American colonies from what they represented originally." The good work thus begun by Mr. Justice Matthews was continued in *Twining v. New Jersey*²¹ when the court, speaking through Mr. Justice Moody, in repudiating the definition of due process in question for a second time, said: "What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Den ex dem. Murray v. Hoboken Land & Improvement Company*, 18 How. 272. . . . Of course, the part of the constitution then before the court was the Fifth Amendment." After approving Mr. Justice Matthew's repudiation in *Hurtado v. California*, Mr. Justice Moody added: "It does not follow, however, that a procedure settled in English law at the time of the emigration and brought to this country and practiced by our ancestors, is an essential element of due process of law. *If that were so, the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a straight jacket, only to be unloosed by a constitutional amendment.*"

And yet, despite these emphatic repudiations of the unhistorical and misleading definition of due process contained in the case in question, its tap-root remains unbroken. That tap-root consists of the entirely unfounded assumption *that there were in England a certain class of Crown or government cases, which were immemorially excluded by a special rule or practice of the Court of Exchequer from the protection of due process or the law of the land*, because, as Mr. Justice Curtis expressed it, no government can allow certain matters "to become subjects of judicial controversy according to the course of the law of the land." The earnest purpose of this article is to demonstrate, first, that no such principle ever existed or could exist in the English constitutional system; second, that no such special rule or practice of the Court of Exchequer as Mr. Justice Curtis put forward, ever did or does exist in England; third, that the deadly doctrine drawn from that indefensible assumption is eating like a canker sore into the vitals of American constitutional law. As

²¹ 211 U. S. 78.

a striking illustration reference may be made to the case of *United States v. Ju Toy*,²² in which it is said: "It is unnecessary to repeat the often-quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Den ex dem. Murray v. Hoboken Land & Improvement Company*, 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case. *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 547; *Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U. S. 100; *Public Clearing House v. Coyne*, 194 U. S. 497, 508, 509." In the second case cited, the court, after referring to *Murray v. Hoboken Land & Improvement Company* by name and saying that "it was decided in that case (upon the false assumption that has been herein exposed) to be consistent with due process of law for Congress to provide summary means to compel revenue officers and, in case of default, their sureties to pay such balances of the public money as might be in their hands," added: "Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was 'due process of law,' and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."²³ But unfortunately that strange and entirely unsupported doctrine has by no means been limited to cases involving the expulsion of aliens. The last case cited, *Public Clearing House v. Coyne*, involved the regulation of the mails, and even as to that sacred subject the court said: "It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. . . . The action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. *Bates & G. Company v. Payne*, 194 U. S. 106, ante 894. That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. *Den ex dem. Murray v. Hoboken Land & Improvement Company*, 18 How. 272, 280." *The regulation of the mails, including*

²² 198 U. S. 253.

²³ *Ekiu v. United States*, 142 U. S. 651, and other cases cited.

the freedom of the press, has thus passed under the autocratic control of an administrative system whose authority rests now upon the judicial finding by our highest court that under the American constitution there is a widening circle of governmental cases not protected by the law of the land, because certain matters can not be suffered by government "to become subjects of judicial controversy according to the course of the law of the land." Let us not deceive ourselves. No such rule of law ever existed in England in the past or present. It finds its only parallel in the administrative law (*droit administratif*) of France, a term for which there is no equivalent in English legal phraseology for the reason that among Anglican peoples the thing itself does not exist. It has been defined to be "that portion of French law which determines (i) the position and liabilities of all state officials, and (ii) the civil rights and liabilities of private individuals in their dealings as representatives of the state, and (iii) the procedure by which these rights and liabilities are enforced." *Droit administratif* has no right to exist in a country in which there is due process of law or the law of the land, because it assumes that the ordinary courts have no jurisdiction to administer it. Such law is administered by administrative courts (*tribunaux administratifs*), at the head of which stands in France the Council of State. Under the fatal exception to the law of the land born of a lamentable misapprehension in *Murray v. Hoboken Land & Improvement Company*, we are rapidly building up a *droit administratif* in the United States.

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